

## IN THE SUPREME COURT FOR THE STATE OF MONTANA

No. DA 10-0106

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

GEORGE NOEL,

Defendant and Appellant.

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**APPELLANT'S OPENING BRIEF**

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On Appeal from the Montana Nineteenth Judicial District Court, Lincoln County,  
The Honorable Michael C. Prezeau, Presiding

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### **Montana Cases**

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### **Statement of the Case**

Defendant-Appellant George Noel (Noel) appeals the district court's entry of the Modified Judgment And Sentence under Cause No. DC-02-25 because the State's Petition to Revoke the sentence under that cause number was dismissed by the district court.

### **Statement of the Facts**

On March 14, 2000, George Noel entered an *Alford* plea to the offense of Sexual Assault, a felony, in violation of Mont. Code Ann. § 45-5-502, committed on or about November 8, 1998. (D.C. Doc. at 111) (Cause No. DC-98-94). Noel was sentenced to the Montana State Prison for a period of ten years, with 2 suspended.

On October 4, 2002, George Noel pled guilty to Bail-Jumping, a felony, in violation of Mont. Code Ann. § 45-7-308, committed on or about August 21, 2000. (Cause No. DC-02-25). Noel was sentenced to the Montana State Prison five years, with five years suspended to run consecutively to the sentence imposed under Cause No. DC-98-94).

A petition to revoke probation in DC-98-94 was filed August 10, 2009 for violation of the conditions of probation. (D.C. Doc. 124). On August 13, 2009, a petition to revoke the sentence in cause No. DC-02-25 was filed for violations of

probation. (DC. Doc. 49).

A Revocation / Evidentiary Hearing was set for December 10, 2009 for both Cause Nos. DC-98-94 and DC-02-25. Prior to the hearing, Noel's attorney filed a motion to dismiss the revocation proceeding as to Cause No. DC-02-25 because that sentence was to run consecutively to the DC-98-94 sentence, and, since the DC-98-94 sentence had not yet terminated, the revocation of the DC-02-25 sentence was untimely. (D.C. Doc. 77). The State did not oppose the motion to dismiss. (12/10/2009 Tr. At 16). As a result, the district court dismissed the Petition to Revoke Sentence in Cause No. DC-02-25. (12/10/2009 Tr. at 16-17).

After the district court dismissed the State's Petition to Revoke in Cause No. DC-02-25, the district court *sua sponte* amended the conditions of probation under DC-02-25 pursuant to Mont. Code Ann. § 46-18-203(7)(c). (12/10/2009 Tr. at 57; 79). The modified sentence in DC-02-25 was incorporated into the Modified Judgment And Sentence filed January 4, 2010. (D.C. Doc. 78). *See* Appendix A, Judgment and Sentence; and Appendix B, Modified Judgment and Sentence.

### **Standard Of Review**

This Court reviews whether a district court followed statutory requirements applicable to revocation of a suspended sentence as a matter of law and the review is plenary. *State v. Brister*, 2002 MT 13, ¶ 12, 308 Mont. 154, 41 P.3d 314.

### **Summary of Argument**

The district court erred when it *sua sponte* amended the conditions of probation under Cause No. DC-02-25 after it had dismissed the State's Petition to Revoke Probation in that case.

### **Argument**

Section 46-18-203 of the Montana Code Annotated governs the revocation of a suspended or deferred sentence, including the modification of the conditions of probation. The statute provides that “*upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence, any condition of a deferred imposition of sentence, or any condition of supervision after release from imprisonment imposed... the judge may issue an order for a hearing on revocation.*” Mont. Code Ann. § 46-18-203(1) (emphasis added). Under subsection (7)(c), at the hearing, a judge may set, modify, or add conditions of probation even if a judge finds that an offender has not violated a term or

condition of a suspended or deferred sentence. (*Id.*) However, under subsection (1) any modification of the conditions of probation requires that the State first file a petition to revoke the sentence.

In the instant case, the State filed a Petition to Revoke Probation in both of Noel's cases: Causes DC-98-94 (D.C. Doc. at 124) and DC-02-25 (DC. Doc. 49). However, before the Revocation / Evidentiary hearing was held, the district court granted Noel's unopposed motion to dismiss the Petition to Revoke Probation as to the DC-02-25 case because it was untimely. (12/10/2009 Tr. at 16-17). Therefore, because the Petition to Revoke Probation was dismissed, the district court's modification of the conditions of probation in DC-02-25 was illegal because modification can only be made upon a petition by the State. Mont. Code Ann. § 46-18-203. Further, because the revocation on DC-02-25 was dismissed, the district court lacked the ability to add or modify conditions.

Because the district court exceeded its authority in imposing new conditions on Noel's 2002 sentence, the Modified Judgment And Sentence January 4, 2010 is invalid and should be dismissed, leaving the original October 2002 Judgment And Sentence in effect.

### **Conclusion**

The district court erred when it entered the Modified Judgment And

Sentence in DC-02-25 on December 10, 2009 because the petition to revoke the probation under that cause number was dismissed. Therefore, the district court's Modified Judgement And Sentence should be dismissed and the original Judgment And Sentence of October 4, 2002 should control.

Respectfully submitted this 17 day of May, 2010.

                    /s/                      
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One of the Attorneys for Appellant



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Mont. R. App. P., I hereby certify that this Appellant's Opening Brief is printed in proportionally spaced Times New Roman text with a 14 point typeface; is double spaced except for footnotes and for quoted and indented material; and the word count, as calculated by my WordPerfect X3 software, is not more than 5000 words, not averaging 280 words per page.

Dated this 17 day of May, 2010.

/s/  
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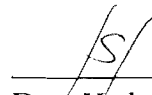
## **CERTIFICATE OF SERVICE**

I, Ben Kolter, do hereby certify that I mailed a true and correct copy of this  
Appellant's Brief to the following via United States Mail or third party carrier:

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